Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-309

TOUCHE ROSS & Co.,

Petitioner,

against

EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc., and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

BRIEF OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Respondent (plaintiff-appellant below) Securities Investor Protection Corporation ("SIPC") submits this brief in opposition to the petition of (defendant-appellee below) Touche Ross & Co. ("Touche Ross") for a writ of certiorari, on the ground that no valid reasons are present for this Court's review of the decision of the Court of Appeals for the Second Circuit.

Opinions Below

In an opinion written by Judge Lumbard, the Court of Appeals held (1) that customers of a defunct brokerage firm have a right of action under Section 17(a) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78q(a), against an accounting firm which breaches its duty under that Section, and (2) that SIPC may assert that right of action as the subrogee of such customers.* Judge Timbers wrote an opinion in which he expressly concurred without qualification in Judge Lumbard's majority opinion. Judge Mulligan wrote a dissenting opinion disagreeing with the majority's holdings.

These opinions below, rendered on April 21, 1978, are not yet officially reported, and are printed in the Appendix to the petition for certiorari at 1a-35a.** On July 7, 1978, the Court of Appeals denied Touche Ross' petition for rehearing and suggestion for rehearing *en banc,* no active judge or judge who was a member of the original panel having requested that a vote be taken on said suggestion (38a-39a). The opinion of the District Court, which was reversed, is reported at 428 F.Supp. 483 (S.D.N.Y. 1977), and is printed in the Appendix to the petition for certiorari at 40a-58a.

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* The court below also held that respondent Edward S. Redington, as Trustee for the liquidation of the business of Weis Securities, Inc. (the "Trustee"), may assert a Section 17(a) cause of action as the bailee of the property of the customers of the defunct brokerage firm. The Trustee is submitting a separate brief in opposition to the present petition for a writ of certiorari.

** References herein to the opinions below will be to those opinions as printed in the Appendix to the petition for certiorari. Numerals followed by the letter "a" refer to pages in that Appendix.

Counterstatement of Questions Presented

1. Having recognized that a broker's customers are the "favored wards" of Section 17(a) of the 1934 Act because Congress enacted that Section for their protection, and having further recognized that Section 17(a) imposes a duty on accountants because their failure to properly prepare the reports required by that Section deprives the broker's customers of the protection intended by Congress, did the Court of Appeals err in holding that a now-defunct broker's customers have a right of action under Section 17(a) against an accountant whose certified Section 17(a) reports were false and misleading?

2. Having recognized that Congress intended SIPC's statutory subrogation right to customer claims against a defunct broker's estate to be available in addition to, and not in derogation of, SIPC's common law subrogation rights against third parties, did the Court of Appeals err in holding that SIPC, may maintain an action as subrogee against the defunct broker's accountant?

Additional Statute Involved

Even though the basis for invoking the jurisdition of the federal courts here is Section 27 of the 1934 Act, 15 U.S.C. § 78aa, Touche Ross has omitted that Section from its list of "Statutes and Rules Involved" (petition for certiorari at 3). Section 27 broadly grants to "the district courts of the United States . . . exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. . . ." SIPC and the Trustee have invoked Section 27 because their action is brought to impose liability upon Touche Ross for its breach of the duty

created by Section 17(a) of the 1934 Act and the regulations thereunder. Significantly, unlike Section 18(a) of the 1934 Act upon which Touche Ross places such heavy reliance, and unlike the statutes involved in the cases cited by Touche Ross in support of its *expressio unius* argument, Section 27 does not limit access to the federal courts to a limited class of plaintiffs. Instead, it permits any protected person to enforce, through the federal courts, any liability or duty created by the 1934 Act and the regulations thereunder.

Counterstatement of the Case

The Purpose and Function of Section 17(a) and the Related Role and Duty of Accountants

Section 17(a) of the 1934 Act (59a) and the rules and regulations thereunder (62a-70a) require broker-dealers to file certain financial reports so as to assure their customers that the broker-dealer is financially sound enough to return the customers' cash and securities on demand. The vital function and purpose of these Section 17(a) reports in effectuating Congress' intention to protect brokers' customers was succinctly summarized by the court below:

> "In order to provide a complete and accurate picture of a broker's financial condition, the SEC requires that the broker enlist an independent accountant to audit and certify its statements, list any matters to which the accountant takes exception, and provide certain additional financial data. Rule 17a-5(b), (i), (k). Furthermore, a notice of any 'material inadequacies' found by the accountant in the broker's procedures must be sent to the broker's customers. Rule 17a-5(m)(3).
>
> "*The function of this arsenal of financial reports is to protect the broker's customers.* One of the main methods adopted by the SEC to shield customers is the net capital rule, in either the form promulgated by the SEC, rule 15c3-1, or the stricter version enforced by the New York Stock Exchange, Exchange Rule 325.
>
> "The net capital rule is a requirement that a broker maintain a certain minimum ratio of liquid assets to aggregate indebtedness; its 'principal purpose . . . is to require that the capital position of a broker . . . will always be sufficiently liquid to cover his current indebtedness, in order to be able at all times to promptly meet [sic] the demands of customers.' Exchange Act Release No. 8024, 6 Fed. Sec. L. Rep. (CCH) ¶ 72,129 (1967). As amended in order to take into account the creation of SIPC, the rule serves particularly to 'protect customers prior to the time when the broker's . . . assets would be [in]sufficient to satisfy customers in the event of liquidation.' Exchange Act Release No. 11,497, [1975-76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,212.
>
> "It is the reporting system created by section 17 that provides the SEC and other regulatory authorities with the information needed to enforce the net capital rule. *Thus, a failure to supply accurate reports will leave the customers without protection until the broker's insolvency can no longer be concealed, and liquidation follows.*" (8a-9a, emphasis added.)

The Section 17(a) reports are filed with the appropriate regulatory authorities, which do not themselves verify the accuracy of the financial information contained therein, but rather rely on the broker-dealer's accountant to prepare and certify accurate financial information. Thus, cognizant of the essential role certified public acountants play in the scheme created by the 1934 Act and relying on this Court's recognition in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), that Section 10(b) of the 1934 Act and Rule 10b-5 thereunder impose a duty on accountants, the court below held at the outset that Section 17 of the 1934 Act also imposes a duty on accountants—upon whom the very efficacy of Section 17 depends (6a-7a).

Weis and Touche Ross

Weis Securities, Inc. ("Weis") was a broker-dealer subject to the requirements of Section 17(a) and the rules and regulations thereunder. Its 1972 Section 17(a) reports were prepared by and contained certifications made by Touche Ross, a firm of certified public accountants. However, these Section 17(a) reports and certifications therein were materially false and misleading.* Consequently, the regulatory agencies and Weis' customers were lulled into assuming that Weis was financially sound in 1972, when, in point of fact, it was virtually on the verge of bankruptcy, although still salvageable. Accordingly, these customers entrusted, or continued entrusting, their cash and securities to Weis.

By means of the 1972 Section 17(a) reports, Touche Ross effectively certified, and aided and abetted, the 3.2 million dollar fraud which Weis' subsequently indicted and convicted officers perpetrated on Weis' customers. In 1973, when Weis' true financial condition finally came to light and had further deteriorated so as to necessitate Weis' immediate forced liquidation, the cash and securities on hand were not sufficient to make Weis' customers whole. Thus, it became SIPC's obligation to satisfy, within certain statutory limits, the claims of Weis' customers. To date, this has resulted in the depletion of the SIPC fund by approximately fourteen million dollars.** Had Touche Ross properly fulfilled its Section 17(a) duties, the very purpose of that Section—the protection of Weis' customers *per se*—

* The complaint, which alleges Touche Ross' breach of its Section 17(a) duties in great detail, is annexed hereto as an Appendix (see pp. 29-58, *infra*). Because the allegations in the complaint must be accepted as true under the present posture of this case, they are incorporated by reference here.

** Customer and creditor claims for additional millions of dollars have also been asserted in the Weis liquidation and, to date, remain unsatisfied. See the Trustee's brief in opposition to the petition for a writ of certiorari.

would not have been defeated and the concomitant depletion of the SIPC fund would have been avoided.

SIPC and Its Claims

SIPC, a quasi-governmental, non-profit membership organization whose membership consists of virtually all the registered broker-dealers and national securities exchange members in this country, was created by and organized under the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. §§ 78aaa, *et seq.** This Court succinctly summarized the background and purposes of SIPA in *SIPC* v. *Barbour*, 421 U.S. 412, 415 (1975):

> "Following a period of great expansion in the 1960's, the securities industry experienced a business contraction that led to the failure or instability of a significant number of brokerage firms. Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disastrous effects on customer assets and investor confidence, this situation also threatened a 'domino effect' involving otherwise solvent brokers that had substantial open transactions with firms that failed. Congress enacted the SIPA to arrest this process, restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers."

The last stated purpose, that of up-grading broker-dealer responsibility, was aimed at eliminating ". . . to the maximum extent possible, the risks which lead to customer loss." H.R.Rep. No. 91-1631, 91st Cong., 2d Sess. 28 (1970).

* SIPA was recently amended by the Securities Investor Protection Act Amendments of 1978, Pub. L. 95-283, 92 Stat. 249 *et seq.*

Consonant with its purposes, SIPA empowered SIPC *inter alia* to commence proceedings for the liquidation of those of its members whose precarious financial condition posed the threat of loss to its customers. In addition, SIPC was required to satisfy, within certain statutory limits, the claims of customers against a liquidated SIPC member's estate. Thus, SIPC was created as a protective device to avoid or minimize the losses which the customers of a broker-dealer may suffer by reason of the latter's financial difficulty. That device was triggered upon the belated discovery in 1973 of Weis' true financial condition: on May 30, 1973, the District Court for the Southern District of New York granted SIPC's application for a decree adjudicating Weis' customers as in need of the protection afforded to them by SIPA, ordered the liquidation of Weis, and appointed the Trustee to liquidate its business. Subsequently, SIPC provided some fourteen million dollars to the Trustee for payment of claims submitted by Weis' customers.

Had Weis' inadequate and rapidly deteriorating financial condition been discovered as early as 1972, Weis could still have been saved by prompt remedial action, such as the infusion of new capital or merger with another brokerage firm. Obviously, had Weis been saved, its customers' claims would not have arisen and the SIPC fund would not have been depleted as it has been. However, because Touche Ross' Section 17(a) certifications were false and misleading, the possibility of remedial action in 1972 was prevented, the forced liquidation of Weis in 1973 became inevitable, and SIPC's fourteen million dollar loss necessarily ensued.

Accordingly, after a lengthy and thorough investigation of the circumstances which brought about the Weis liquidation (and particularly Touche Ross' direct responsibility for that liquidation), SIPC and the Trustee commenced this action against Touche Ross on April 30, 1976, in the District Court for the Southern District of New York.* SIPC asserts eight claims in its complaint. Four of these claims are asserted in SIPC's own right (¶¶ 50-53, 59-63, 70-72, 78-80), and the other four are asserted by SIPC as subrogee of those Weis customers whose bankruptcy claims have been satisfied through the depletion of the SIPC fund (¶¶ 54-58, 64-69, 73-77, 81-85). Two of SIPC's direct claims and two of its subrogation claims arise under the 1934 Act (¶¶ 50-69), and the remaining four claims plead Touche Ross' common law liability.

The 1934 Act claims are the very essence of the complaint and are predicated upon Touche Ross' violation of the duty imposed upon it by Section 17(a), as to which federal jurisdiction is exclusive under Section 27 of the 1934 Act. The common law claims are asserted on the basis of pendent jurisdictions.**

The Holdings Below

The Court of Appeals held that Weis' customers have an implied Section 17(a) right of action against Touche Ross (7a-12a), and that because SIPC has satisfied their claims it may assert that right of action as their subrogee

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* SIPC and the Trustee have also commenced a state court action against Touche Ross which is virtually dormant. That action is, of course, far less comprehensive than the federal action since no Section 17(a) claims are asserted therein. Moreover, as the Court of Appeals noted, "The state court action was commenced first in a highly technical sense. It was begun by service of a summons without complaint (the complaint was not served until after filing of the federal complaint), and then apparently ignored for some months by mutual consent." (6a, n. 7). Significantly, the Court of Appeals, in remanding the action, expressly left it for the District Court to decide whether the federal action should be stayed pending determination of the state action (15a).

** Again significantly, the Court of Appeals expressly left it for the District Court to decide, on remand, whether to exercise pendent jurisdiction over SIPC's common law claims (15a).

(12a-13a).* In reaching this result, the Court of Appeals recognized that the express remedy provided in Section 18 of the 1934 Act for purchasers and sellers of securities is not determinative here because Congress enacted Section 17(a) for the protection of investors in their capacity as the *customers of a brokerage firm* to whom they entrust their cash and securities, not in their capacity as the *purchasers or sellers of securities* issued by some corporation (11a-12a).

The Reasons For Denying The Certiorari Petition

There simply is no valid reason for this Court to grant the petition for a writ of certiorari to the Court of Appeals for the Second Circuit. Certainly, as demonstrated hereinbelow, the considerations set forth in this Court's Rule 19 with respect to certiorari petitions are hardly present here.

I. Review Of The Decision Below By This Court Would Be Premature And Inappropriate

Not only are the narrow holdings below correct, fully consonant with the applicable decisions of this Court (see pp. 16-20, *infra*) and easily compatible with a Third Circuit decision in an unrelated case (see pp. 14-16, *infra*), but this action is neither ripe enough, nor are the issues involved herein recurrent or significant enough, to present an important question of federal law for review on a writ of certiorari.

First of all, this action is merely at the pleading stage, the court below having reviewed and reversed the granting of a motion to dismiss the complaint. Thus, no discovery has yet been undertaken with respect to such vital factual matters as: Touche Ross' involvement in preparing and certifying Weis' fraudulent Section 17(a) financial reports; the reliance of Weis' customers (whether explicitly or implicitly) on those reports; the reliance of the regulatory authorities (and SIPC) on those reports and the extent to which Weis' liquidation could have been avoided, and its customers' cash and securities could have been preserved, had Touche Ross performed its services for Weis in 1972 in a manner consonant with its duties under Section 17(a).

* With respect to footnote 13 in the majority decision below, which cursorily suggests that SIPC might not be able to maintain a Section 17(a) claim in its own right, see SIPC's accompanying conditional cross petition for certiorari.

Accordingly, the court below left it for the District Court to decide on remand "what the appropriate standard is for accountant liability under section 17" (15a). Touche Ross, on the other hand, seeks to have this Court make an abstract legal determination in an evidentiary vacuum in a case which, as Touche Ross admits, is the first of its kind under the 1934 Act. By so doing, Touche Ross ignores the fact that it would be far more appropriate for this Court to fashion a rule of law in the light of the facts which remain to be developed and crystallized in this case and perhaps in other cases under Section 17(a). This case is neither ripe enough, nor has Section 17(a) been sufficiently considered by courts below in the context of the situation here presented, to allow this Court to properly resolve the scope of accountants' duties and liabilities under that Section.

Moreover, the determination of the issues left by the Court of Appeals for the District Court may very well terminate this action in the federal courts and thereby, naturally, obviate any potential occasion for review by this Court. The Court of Appeals provided that:

> "Since we hold that both SIPC and the Trustee may maintain this action against Touche Ross, we remand to the district court for further proceedings consistent

with this opinion. We leave to it in the first instance a number of questions that will now arise: whether to stay the federal action pending determination of the state action; whether to exercise pendent jurisdiction over the plaintiffs' common-law claims; and what the appropriate standard is for accountant liability in actions under section 17, cf. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)." (15a)

Of course, Touche Ross is undeterred by the fact that a review by this Court of the decision below would be premature. Instead, Touche Ross raises the specter of the opening of the "floodgates of litigation" as a result of the decision below.* However, for all its speculative and bloated assertions as to the potential recurrence of Section 17(a) cases and as to the singular significance of the decision below, Touche Ross cannot escape the fact that the context in which this action arises is extraordinary and, accordingly, the issues involved herein are of limited significance.

Touche Ross has been made a defendant in this action because of its actual facilitation of the collapse of a major brokerage firm. SIPC has invoked Section 17(a) because, had Touche Ross not violated its duties under that Section, the liquidation of Weis would have been avoided, the cash and securities entrusted to Weis by its customers would have been preserved, and the fourteen million dollars SIPC has lost would have been saved. This set of circumstances is rare indeed, and helps to explain why, as Touche Ross has noted, this is the first case of its kind in the 44 years since the enactment of Section 17(a). Brokerage firm liquidations are hardly a commonplace occurrence, and the

* The American Institute of Certified Public Accountants has sought leave to file an *amicus curiae* brief in support of its member's certiorari petition herein. As might be expected, in its proposed brief, the Institute also asserts the speculative and unfounded alarm of a plethora of litigation.

facilitation of such liquidations by accountants who defy their Section 17(a) obligations is, of course, even more extraordinary. Thus, the projection of the commencement of countless Section 17(a) actions against accountants is more imagined than real.

The invocation of the cause of action recognized by the court below would be triggered mainly when a broker is in such financial difficulty that its assets are insufficient to satisfy its debts to its customers. This factual setting is simply not one which presents the possibility of liability in an "indeterminate amount" to an "indeterminate class." Indeed, the very enactment of SIPA renders the possibility of a plethora of litigation under Section 17(a) particularly remote, since most claims filed by the customers of defunct brokers are fully satisfied through the depletion of the SIPC fund.

In any event, whether a customer of a defunct broker should have a Section 17(a) right of action against the brokers' accountant is hardly a question of great moment, except perhaps for the accountant himself and the customers. Similarly, the second holding of the court below, *viz.*, that SIPC is subrogated to the customer's claims against the accountant, may hardly be said to have widespread implications, although that holding is obviously significant as far as SIPC itself is concerned. Thus, the issues which would have to be considered should the petition for certiorari be granted are of importance to such a peculiar and narrow class of litigants that those issues are simply not worthy of this Court's attention.

Finally, the true significance of the decision below is its recognition, in accordance with Congress' own recognition, that the customers of a broker are, as such, entitled to protection, and that the accountant of a broker may not defy his Section 17(a) duties with impunity. Manifestly, the decision below is consistent with the national policy to protect investors in the securities markets, and thus the

public interest hardly requires a review of that decision by this Court.

II. The Second Circuit's Section 17(a) Holding Below Is Not In Conflict With The Third Circuit's Section 13(a) Holding

In attempting to persuade this Court that the Second Circuit's decision below is "in conflict with the decision of another court of appeals on the *same* matter" (Rule 19 of this Court, emphasis added), Touche Ross essentially relies on *dictum* in an Eastern District of Pennsylvania case which was affirmed by the Third Circuit in a decision which made no mention whatsoever of Section 17(a) of the 1934 Act. *In re Penn Central Securities Litigation,* 347 F. Supp. 1327, 1340 (E.D.Pa. 1972), relevant point adhered to on reargument, 357 F.Supp. 869, 876 (E.D.Pa. 1973), *aff'd,* 494 F.2d 528, 539-41 (3d Cir. 1974).

There, the District Court *held* only that Section 18(a) is the exclusive remedy for a violation of Section 13(a) of the 1934 Act (347 F. Supp. at 1340). Even though the plaintiffs (present and former shareholders of the Penn Central Company) had not alleged any violation of Section 17(a) (see 347 F.Supp. at 1332), the District Court lumped that statute together with other "provisions that require the filing of applications, documents and reports", and gratuitously suggested that "Section 18(a) is the 'catch-all' civil liability provision for all of the reporting requirements of the Exchange Act" (347 F.Supp. at 1340). On reargument, the District Court adhered to its initial holding as to the quite obvious exclusivity of a Section 18(a) remedy for a Section 13(a) violation, and made no mention of Section 17(a). On appeal, the Third Circuit affirmed this holding, with no mention of Section 17(a). This may hardly be deemed to represent a conflict with the Second Circuit's holding here that the customers of a brokerage firm have a right of action under Section 17(a).

Moreover, the patent relevance of Section 18(a) to Section 13(a) only serves to highlight the inapplicability of Section 18(a) to the Section 17(a) claims asserted in the present case. Section 13(a) requires certain *issuers of securities* to file with the SEC such documents, information and reports as it prescribes "as necessary or appropriate for the proper protection of investors and *to insure fair dealing in the security*". If these filed statements are false or misleading, Section 18(a) provides a remedy to any person who, in reliance on them, "*purchased or sold a security at a price which was affected by such statement*". Thus, Sections 13(a) and 18(a) naturally go hand-in-hand: both were intended for the protection of purchasers and sellers of securities issued by corporations. However, Section 17(a) and Rule 17(a)-5 thereunder are concerned with the protection of an entirely different class of investors—*the customers of broker-dealers;* they simply do not share the concern of Sections 13(a) and 18(a) for the protection of investors *qua* purchares and sellers of securities.

The District Court in the *Penn Central Securities Litigation* case recognized that:

> "The legislative history with respect to Section 13(a) indicates that Congress enacted the provision to insure that investors would receive adequate periodic *reports concerning the operation and financial condition of corporations.*" (347 F. Supp. at 1340, emphasis added)

By way of contrast, the Second Circuit below recognized that:

> "The language of section 17, the SEC rules in the 17a-5 series, and an analysis of the role played by accountants' reports in the regulation of brokers make clear the extent to which *Weis' customers are members of a class peculiarly protected by Section 17.*
>
> • • •

> *"The function of this arsenal of [Section 17(a)] financial reports is to protect the broker's customers."* (7a-8a, emphasis added)

Manifestly then, Sections 13(a) and 18(a) are aimed at protecting investors insofar as they purchase the securities of a corporate issue; Section 17(a), on the other hand, is aimed at protecting investors insofar as they consider or continue entrusting their cash and securities to a stock broker. Thus, Section 17(a), unlike Section 13(a), cannot be wedded to Section 18(a), nor has the Third Circuit even implied, let alone held, that Section 18(a) provides the exclusive remedy for a Section 17(a) violation. Consequently, there is no conflict between the Third Circuit's affirmance in the *Penn Central Securities Litigation* case and the Second Circuit's decision here. The fact that Congress intended Sections 13(a) and 17(a) to serve separate and distinct purposes compels the conclusion that the Third Circuit's Section 13(a) holding and the Second Circuit's Section 17(a) holding are perfectly capable of coexisting without any intervention by this Court here.

III. The Decision Below Is Fully Consonant With The Applicable Decisions Of This Court

Far from conflicting with the applicable decisions of this Court, the decision below is fully consonant with this Court's consistent recognition, as most recently stated in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 21 (1977), that "where Congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied *in favor of the particular class intended to be protected by the statute*" (emphasis added). Indeed, in implying a Section 17(a) right of action in favor of the customers of defunct brokerage firm, the teaching of *Piper* was precisely adhered to by the court below:

> ". . . it is plain that brokers' customers are the favored wards of section 17. We cannot agree that Congress simultaneously sought to protect a class and deprived the class of the means of protection." (11a)

Of course, in *Piper* the parties seeking the recognition of an implied right of action under Section 14(e) of the 1934 Act were themselves members of the very class Congress intended to *regulate* (430 U.S. at 37); here, on the other hand, as even Touche Ross and Judge Mulligan below concede, Weis' customers are none other than the members of the class Congress intended to *protect* under Section 17(a).*

Similarly, the decision below is perfectly consonant with this Court's *unanimous* decision in the seminal case of *J. I. Case* v. *Borak*, 377 U.S. 426 (1964), where a private right of action was implied under Section 14(a) of the 1934 Act. *Borak*, which this Court cited with favor in *Piper* (430 U.S. at 25),** supports the decision below in

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* While this Court stated in *Piper* that "[w]hether shareholders-offerees, the class protected by § 14(e), have an implied cause of action under § 14(e) is not before us, and we intimate no view on the matter" (430 U.S. at 42, n. 28), it seems apparent from this Court's repeated references to the fact that the plaintiffs were not members of the protected class, but rather, were members of the regulated class, that this Court would have been far more willing to recognize a right of action in behalf of shareholders-offerees, the class protected by Section 14(e). In fact, Justices Stevens and Brennan stated in their dissent that

> "No one seriously questions the premise that Congress implicitly created a private right of action when it enacted § 14(e) in 1968. Also beyond serious question is the proposition that the members of the class which Congress was especially interested in protecting may invoke the private remedy . . ."

and noted in the accompanying footnote that the question is not "*whether* the statute created an implied private remedy", but rather "*who* may invoke that remedy" (emphasis in original). 430 U.S. at 55.

** In his concurring opinion below, Judge Timbers emphasized the continued viability of *Borak* (17a), and pointed to Mr. Chief

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at least two vital respects. First, *Borak* recognized (377 U.S. at 432), as did *Piper* (430 U.S. at 25), that the intended beneficiaries of a statute may have a right of action implied thereunder in their favor where such an implication is necessary. Second, *Borak* recognized (377 U.S. at 432) as did the court below here (10a-11a, see especially note 12) that private enforcement is a necessary supplement to SEC action where the intended beneficiaries of a statute are the ones seeking to enforce it and the SEC does not have the capacity to itself effectuate the protection intended by Congress.*

It should also be remembered that the supplementation of SEC action by private enforcement was but one of the compelling reasons recognized by the court below as necessitating the implication of a Section 17(a) right of action. The court also observed that SEC injunctive actions and criminal prosecutions will hardly restore to customers the money they have lost upon the collapse of their brokerage firm (10a). And finally the court below quite correctly recognized that:

". . . it is evident that just as the problems caused by

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Justice Burger's opinion in *Piper*, 430 U.S. at 25, Mr. Justice Marshall's opinion in *SIPC* v. *Barbour*, 421 U.S. 412, 417 (1975), and Mr. Justice Rehnquist's opinion in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975), as evidence of this Court's reaffirmance of the *Borak* principle (17a, n. 1).

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* Of course, in *Piper* this Court did not find the SEC's "institutional limitations *alone*" (430 U.S. at 41, emphasis added) to be a sufficiently compelling reason for implying a right of action in favor of those who are not members of the protected class. However, here, as in *Borak*, the fact that the SEC cannot, nor is it supposed to, independently verify the § 17(a) financial information prepared and certified by the broker's accountants was relied upon below as further supporting the recognition of a right of action in favor of the members of the *very* class Congress sought to protect.

insolvent brokers are national in scope, so must be the standards governing their reporting. Section 17 is part of a statute as to which federal courts have exclusive jurisdiction; state law protection of brokers' customers varies widely. There is no reason to believe that the remedy sought herein is one traditionally relegated to state law". (11a)

In addition to being consonant with *Piper* and *Borak*, the decision below was entirely consistent with the longstanding principle, established in *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916), that a party subject to a statutory duty (as is Touche Ross under Section 17(a) and Rule 17a-5 thereunder) is also subject to liability for its violation of that duty. This principle of "statutory tort" has been repeatedly applied to recognize a right of action under various securities statutes. See, *e.g.*, *Baird* v. *Franklin*, 141 F.2d 238, 245 (2d Cir. 1944), *cert. denied*, 323 U.S. 737 (1944) (§ 6b of the 1934 Act); *Taussig* v. *Wellington Fund, Inc.*, 313 F.2d 472, 476 (3d Cir. 1963), *cert. denied*, 374 U.S. 806 (1963) (§ 34(d) of the Investment Company Act of 1940, 15 U.S.C. § 80a-34(d)); see also, *Franklin National Bank* v. *L. B. Meadows & Co.*, 318 F.Supp. 1339, 1341-42 (E.D.N.Y. 1970), for a convenient summary of the numerous securities statutes under which an implied right of action has been recognized. Thus, as the court below noted, "[a]t least since [*Borak*], it has been accepted in securities law that when a statutory provision imposes a duty on someone in favor of a class of protected persons, those persons may sue for the 'statutory tort' committed when the duty is breached" (10a).

Moreover, the decision below is obviously faithful to this Court's recognition that the entire body of securities legislation is fundamentally remedial in nature. See, *e.g.*, *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971); *SEC* v. *Capital Gains Research*

Bureau, 375 U.S. 180, 186, 195 (1963). And, of course, since the court below carefully and correctly applied the analysis (7a-11a) required in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975), it can hardly be contended that this Court's prescribed criteria for the implication of a right of action were unheeded.* Accordingly, the decision below in no respect conflicts with the applicable decisions of this Court.

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* Touche Ross contends, as did Judge Mulligan below (23a), that the *Cort* v. *Ash* analysis should never have been reached because, as they would have it, the *Cort* factors are inapplicable to a statute which provides some express remedy, albeit not a remedy of which the particular plaintiffs can avail themselves. However, as recently as last May, this Court itself negated this contention. In *Santa Clara Pueblo* v. *Martinez,* 413 U.S. 913 (1978), notwithstanding that the plaintiff did not invoke the express remedy provided in the Indian Civil Rights Act of 1970, this Court proceeded to make the *Cort* analysis to determine whether the additional remedy she did seek may be implied under that statute. Likewise, as Judge Timbers pointed out in his concurring opinion below (16a-17a), in *Blue Chips Stamps* v. *Manor Drug Stores, supra,* this Court applied the *Cort* language in reaffirming the implication of a right of action under Section 10(b) of the 1934 Act and Rule 10(b)-5 thereunder, even though an express remedy for purchasers and sellers of securities was expressly provided in Section 18 of the 1934 Act. Thus, contrary to Touche Ross', and Judge Mulligan's contention, the *Cort* analysis seems appropriate wherever a statute does not expressly provide the *particular* remedy sought by the plaintiffs, even though some different remedy is expressly provided. Here, the express remedy under Section 18(a) of the 1934 Act applies to an entirely different class (*i.e.,* purchasers and sellers of securities) than the one of which SIPC's subrogors are members (*i.e.,* customers of a brokerage firm). The customers must therefore look to Section 17(a) for enforcement of the protection Congress intended them to have by enacting that statute. Accordingly, the court below properly applied the *Cort* analysis in determining whether, and in concluding that, brokerage firm customers have a right of action under Section 17(a).

IV. The Decisions Of This Court Relied Upon By Touche Ross Are Not Applicable Here

Touche Ross attempts to create the appearance of a conflict by citing decisions of this Court which, in fact, are not applicable here. Thus, Touche Ross relies on *Blue Chip Stamps* v. *Manor Drug Stores, supra; National Railroad Passengers Corp.* v *National Association of Railroad Passengers,* 414 U.S. 453 (1974) ("Amtrak"), and *SIPC* v. *Barbour,* 421 U.S. 412 (1975), in support of its contention that Section 18(a) of the 1934 Act, which provides an express remedy for *purchasers or sellers of corporate securities,* is determinative of the question of whether a right of action may be implied under Section 17(a) in favor of its intended beneficiaries—*the customers of a brokerage firm.*

Citing *Blue Chip Stamps,* Touche Ross argues that, because of Section 18(a)'s purchaser-seller requirement, it was "anomalous" to judicially imply a right of action under Section 17(a) for persons who are not purchasers or sellers. However, the conclusion reached by this Court in *Blue Chip Stamps* that "[i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for *comparable* express causes of action" (421 U.S. at 735-736, emphasis added) resulted from the following predicament confronting the Court: both Sections 10(b) and 18(a) of the 1934 Act were, on their face, addressed to the protection of purchasers or sellers of securities; yet, only Section 18(a) provided for an express right of action, the right of action under Section 10(b) having been judicially implied; and, notwithstanding that Section 18(a) contained a stringent purchaser-seller requirement, it was urged upon the Court that Section 10(b) should not. No such predicament is created by Section 17(a) because, unlike both Sections 10(b) and 18(a), it is not intended to protect purchasers or sellers of securities. It is intended

to protect the customers of broker-dealers. Consequently, it simply can *not* be said about Sections 17(a) and 18(a), as was said in *Blue Chip Stamps* about Sections 10(b) and 18(a), that those sections are "comparable", and no "anomaly" is created by keeping them apart.*

Equally unsuccesful is Touche Ross' attempt to find a conflict between the decision below and the decisions in *Amtrak* and in *Barbour*, both of which did hold that where a statute expressly provides that a particular person may enforce it, such a provision is exclusive. However, as the court below noted (9a), in *Amtrak* the right to enforce the statute was lodged exclusively with the Attorney General, and in *Barbour* only the SEC was statutorily empowered to enforce the statute involved. Here, on the other hand, the plaintiffs have predicated federal jurisdiction upon Section 27 of the 1934 Act, which broadly permits any protected person to enforce, through the federal courts, any liability or duty created by the 1934 Act and the regulations thereunder, obviously including Section 17(a) and Rule 17(a)-5 thereunder. Accordingly, not *Amtrak* or *Barbour*, but *Bell* v. *Hood*, 327 U.S. 678, 684 (1946), is the applicable decision here: ". . . where legal rights have been invaded, and a federal statute provides for a *general right to sue* for such invasion, federal courts may use any available remedy to make good the wrong done" (emphasis added). See also, *J. I. Case* v. *Borak, supra* at 433.**

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* Touche Ross makes a great deal of the fact, as did Judge Mulligan below, that both Sections 17(a) and 18(a) use the word "reports" and that "Section 18(a) follows upon the heels of section 17" (22a). However, such an "analysis" flies in the face of this Court's teaching that securities legislation, enacted for the purpose of avoiding fraud, is not to be construed "technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC* v. *Capital Gains Research Bureau, supra* at 195; see also, *Affiliated Ute Citizens* v. *United States, supra; Superintendent of Insurance* v. *Bankers Life & Casualty Co., supra.*

** Other applicable decisions of this Court further undermine Touche Ross' *expressio unius* argument. By invoking that doc-

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Quite understandably therefore, the court below was unpersuaded by Touche Ross' *Blue Chip Stamps, Amtrak,* and *Barbour* argument, and thus easily disposed of the attempt to wed Section 18(a) to Section 17(a) by stating:

> "Since any misstatement in a section 17 report would not affect the price of the shares of the various issuers in the hands of a broker's customers, a strict application of section 18's limiting language would leave customers without any remedy whatsoever, no matter how egregious the fraud or how grievous their loss. Yet it is plain that brokers' customers are favored wards of section 17. We cannot agree that Congress simultaneously sought to protect a class and deprived the class of the means of protection.
>
> "Our holding is not inconsistent with either the purchaser-seller limitation or section 18, which will continue to apply to all investors in market securities who seek relief *qua* investors. That is, the *Blue Chip* doctrine would bar a suit by an investor who claimed to have been induced not to purchase or sell by a misstatement. We do not believe, however, that the doctrine applies to brokers' customers, protection of whom is wholly independent of protection of investors per se." (11a-12a)

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trine, Touche Ross, in effect, asserts that Section 18(a) impliedly abrogates Section 27 insofar as the enforcement of Section 17(a) is concerned, notwithstanding that "[i]t is a cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). Moreover, ". . . even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent" (*Amtrak, supra* at 458); and, as is undisputed, Congress clearly intended Section 17(a) to protect brokers' customers *as such*, irrespective of whether they buy or sell securities issued by some corporation.

V. The Holding Below With Respect To SIPC's Subrogation Right Should Not Be Reviewed By This Court

Touche Ross also seeks to have this Court review the second holding of the court below, *viz.*, that SIPC may maintain a Section 17(a) cause of action as the subrogee of Weis' customers (12a-13a). Touche Ross again invokes the *expressio unius* doctrine and again cites *Amtrak, supra* at 458, in contending that the express subrogation right in Section 78fff (f)(1) of SIPA is SIPC's only subrogation right. That Section provides that SIPC shall be subrogated to customer claims against the debtor's estate. However, it should be noted that the issue of the extent of SIPC's subrogation right has been mooted, at least as to any future lawsuit, by the 1978 amendments to SIPA which expressly provide that SIPC's right of subrogation to customers' claims is "in addition to all other rights it may have at law or in equity," *e.g.*, subrogation right against third parties. § 9 of Pub. L. 95-283, 92 Stat. 266. Thus, this is hardly an issue with which this Court should concern itself.

Touche Ross' argument that, as a third party, it is immunized by Section 78fff(f)(1) from a SIPC subrogation claim is plainly contrary to Congress' intention and to this Court's applicable decisions. First, as the court below recognized:

> "Section 78fff is a detailed blueprint for the distribution of the liquidated debtor's estate, and it is to be expected that SIPC's rights against the estate would be included in that section. However, there is no reason to believe that this was meant to destroy SIPC's general common-law right of equitable subrogation." (R. 13a)

Indeed Section 78bbb of SIPA provides that:

> "Except as otherwise provided in this Act, the provisions of the Securities Exchange Act of 1934 apply as if this act constituted an amendment to, and was included as a section of, such Act."

And, in turn, Section 28(a) of the 1934 Act provides that:

> "[*t*]*he rights and remedies provided by this title shall be in addition to any and all rights and remedies that may exist at law or in equity.* . . ." (emphasis added)

Thus, SIPC's statutory subrogation right to customer claims against a debtor's estate is simply available *in addition to,* and not in derogation of, SIPC's common-law subrogation right to customer claims against third parties such as Touche Ross. Not surprisingly therefore, the Third Circuit, the only other Court of Appeals which has addressed the issue of SIPC's subrogation right, has reached the same conclusion as did the Second Circuit here. *SEC* v. *Albert Maguire Securities Co.*, 560 F.2d 569, 574 (3d Cir. 1977) (". . . upon payment to a customer, SIPC becomes subrogated to the customer's rights against third parties.").

Moreover, even if there were some valid basis for applying the *expressio unius* doctrine here (which there is not), this Court has cautioned that this doctrine must defer to "generally expressed legislative policy". *SEC* v. *Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). In this regard, it should be noted that, as the court below recognized (13a), Congress' generally expressed policy was that SIPC recapture its expenses to the fullest extent possible.* Finally,

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* For example, SIPA Section 78fff(c)(2)(B)(i) provides:

> ". . . *there shall be repaid to SIPC, in priority to all other claims payable from such single and separate funds,* the amount of all advances made by SIPC to the trustee to permit the completion of open contractual commitments . . ." (emphasis added)

Likewise, SIPA Section 78fff(c)(2)(B)(ii) provides:

> ". . . all costs and expenses specified in clauses (1) and (2) of section 64a of the Bankruptcy Act shall be paid from

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as the court below also recognized (13a), Congress obviously did not intend, by its enactment of SIPA and its creation of SIPC, to benefit wrongdoers such as Touche Ross with a windfall. If, prior to the enactment of SIPA, Touche Ross would have been liable to brokers' customers for its violation of its Section 17(a) duties, it certainly should not be permitted to take advantage of the existence of the SIPC fund to escape liability.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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such single and separate fund in priority to the claims of such single and separate class of creditors, and *any moneys advanced by SIPC for such costs and expenses shall be recouped as such. . . .*" (emphasis added)

And of course, Section 78fff(f)(1), far from abrogating SIPC's common law subrogation right, is yet another example of Congress ' concern that SIPC recoup any losses it can.

APPENDIX

Complaint.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 1981

(IBW)

PLAINTIFFS DEMAND A TRIAL BY JURY

EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc., and SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiffs,

against

TOUCHE ROSS & Co.,

Defendant.

Plaintiffs EDWARD S. REDINGTON, Trustee for the liquidation of the business of Weis Securities, Inc., and SECURITIES INVESTOR PROTECTION CORPORATION, by their respective attorneys, complaining of the Defendant, allege as follows:

JURISDICTION AND VENUE

1. This action arises under the Securities Exchange Act of 1934 (15 U.S.C. Sections 78a *et seq.*) (hereinafter the "1934 Act") and particularly under Section 17 thereof (15 U.S.C. Section 78q), the Securities Investor Protection Act of 1970 (15 U.S.C. Section 78aaa *et seq.*) (hereinafter the "1970 Act"), and the common law.

2. This Court has jurisdiction over Plaintiff Redington's claims by virtue of Section 27 of the 1934 Act (15 U.S.C. Section 78aa); Section 6 of the 1970 Act (15 U.S.C. Section 78fff); Sections 2a(7), 102 and 115 of the Bankruptcy Act (11 U.S.C. Sections 11a(7), 502 and 515); Sections 1331 and 1334 of the United States Judicial Code (28 U.S.C. Sections 1331 and 1334); and principles of pendent jurisdiction. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

3. This Court has jurisdiction over the claims of Plaintiff Securities Investor Protection Corporation by virtue of Section 27 of the 1934 Act (15 U.S.C. Section 78aa), Sections 1331 and 1332 of the United States Judicial Code (28 U.S.C. Sections 1331 and 1332), and principles of pendent jurisdiction. The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.

4. Defendant has its principal place of business in this District and most of the acts alleged herein occurred in this District.

PARTIES

5. Plaintiff Edward S. Redington (hereinafter the "Trustee"), pursuant to the 1970 Act, was duly appointed by Order of this Court dated May 30, 1973 as Trustee for the liquidation of the business of Weis Securities, Inc. ("Weis"), has duly qualified, and is presently acting in such capacity. Section 6(b)(1) of the 1970 Act (15 U.S.C. Section 78fff(b)(1)) provides that a trustee appointed under the 1970 Act shall be vested, *inter alia,* with the same powers and title with respect to the debtor and the property of the debtor as a trustee in bankruptcy and a trustee under Chapter X of the Bankruptcy Act (11 U.S.C. Sections 501-676) have with respect to a bankrupt and a Chapter X debtor.

6. Plaintiff Securities Investor Protection Corporation (hereinafter "SIPC") is a non-profit membership corporation created by and organized under the 1970 Act whose members are, with certain statutory exceptions, all persons registered as broker-dealers under Section 15(b) of the 1934 Act (15 U.S.C. Section 78o(b)) and, with certain statutory exceptions, all persons who are members of a national securities exchange. SIPC has its principal place of business in the District of Columbia. At all relevant times Weis was a member of SIPC.

7. Defendant Touche Ross & Co. ("Touche Ross") is a partnership of certified public accountants with its principal place of business at 1633 Broadway in the City, County and State of New York. In or about 1969 Touche Ross was engaged by Weis as its independent certified public accounting firm, and Touche Ross continued to act in such capacity from about 1969 until about May 1973, when the forced liquidation of Weis commenced.

COMMON ALLEGATIONS

8. At all relevant times prior to May 30, 1973, Weis was a corporation registered as a broker-dealer with the Securities and Exchange Commission (the "SEC") and was engaged in the business of a broker-dealer in securities. From June 1965 until May 1973, Weis was a member of the New York Stock Exchange, Inc. (the "Exchange"), the self-regulatory organization designated by SIPC to examine Weis for compliance with the applicable financial responsibility rules which are imposed on broker-dealers pursuant to Section 6 of the 1934 Act (15 U.S.C. Section 78f) for the protection of the public as a minimum prerequisite for conducting a securities brokerage business.

9. For each of its four fiscal years 1968 through 1971 (ended May 31), Weis' audited financial statements reflected a profit. During early 1972 five of Weis' officers (the "Weis Five") became increasingly concerned that a fair and accurate presentation of Weis' results of operations for fiscal year 1972 would reflect that Weis was operating at a loss.

10. The Weis Five misstated the financial condition and results of operations of Weis in financial reports prepared at fiscal year-end 1972. These reports were required to be filed with regulatory authorities pursuant to Section 17 of the 1934 Act (15 U.S.C. Section 78q) and were directly or indirectly submitted to Weis, its Board of Directors, the SEC, SIPC, the Exchange, and Weis' customers, creditors, lenders and shareholders. Such misstatements were accomplished, by *inter alia,* materially overstating assets, creating non-existent assets, understating liabilities, overstating income, and understating expenses. The purpose and effect of such material misstatements were, *inter alia,* to create a false impression that Weis' earnings for the fiscal year ended May 26, 1972 were $1,700,000 before taxes whereas in truth and in fact Weis had actually suffered losses in that period in excess of $1,500,000.

11. Had Weis' actual financial condition, its actual results of operations, and the misstatements in its books and records been truthfully reported at the end of Weis' 1972 fiscal year, Weis' 1973 forced liquidation under the 1970 Act would not have become necessary, and most if not all of Weis' assets and its good will as a going concern could have been preserved by a number of means including, *inter alia,* change in Weis' management, reversal of its policy of growth and expansion, curtailment or contraction of certain of its operations and business practices, gradual liquidation of some or all of its operations, or merger with another

securities firm. Moreover, if a liquidation of Weis had been necessary as the result of such truthful reporting, such liquidation could have occurred at the end of Weis' 1972 fiscal year, when its assets were greater and the aggregate of its liabilities was lower than a year later.

12. The incorrect and incomplete fiscal 1972 year-end reports prepared by or under the direction of the Weis Five were certified by Touche Ross as being correct and complete. Consequently, the doctoring of Weis' books, records and required reports, the deterioration of its financial condition and the violations of financial responsibility rules could not be nipped in the bud at a time when a forced liquidation of Weis could still have been avoided. Instead, during Weis' fiscal year 1973, Weis' financial condition deteriorated further as the Weis policy of expansion continued unabated. Weis incurred substantial operating losses, depletion of its assets, and depletion of the property held by Weis in trust for its customers. The Weis Five continued to make false and fictitious entries in Weis' books and records, and continued directly or indirectly to submit false reports to Weis, its Board of Directors, the SEC, SIPC, The Exchange, and Weis' customers, creditors, lenders and shareholders in order to conceal Weis' true financial condition.

13. Not until April and May of 1973, as a result of separate investigations by the Exchange and the SEC, did the misstatement of Weis' financial condition come to light. These investigations gradually revealed violations of financial responsibility rules, Weis' unsafe, unsatisfactory and deteriorating financial condition, and the lack of accuracy and reliability of any of its financial statements, including those certified by Touche Ross. These revelations and the resulting uncertainties with respect to Weis' true

financial condition prevented Weis from being saved as a going concern or being merged with another, financially more secure, brokerage firm, and resulted in Weis' forced liquidation under the 1970 Act.

14. On May 24, 1973, the SEC commenced an action in this Court (73 Civ. 2332) against Weis and the Weis Five for injunctive relief to prevent them from conducting the business of Weis in violation of the 1934 Act and the rules and regulations promulgated thereunder. Also on May 24, 1973 (the "Filing Date"), pursuant to Section 5(a)(2) of the 1970 Act (15 U.S.C. Section 78eee(a)(2)), SIPC applied in this Court for a decree adjudicating that the customers of Weis were in need of the protection of the 1970 Act. On May 30, 1973 (the "Date of Adjudication") such a decree was granted, the liquidation of Weis was ordered, and Plaintiff Edward S. Redington was appointed Trustee for the liquidation of the business of Weis.

15. Upon the entry of the decree referred to in the preceding paragraph, SIPC was required by the 1970 Act to provide, and did provide to the Trustee, funds for the payment of claims submitted by customers and certain other creditors of Weis and for certain administrative expenses of the liquidation.

16. At all relevant times, Defendant Touche Ross held itself out to Weis, the SEC, SIPC, the Exchange and the general public as possessing the ordinary skill, ability and expertise of certified public accountants in accounting and auditing matters, and as being qualified, *inter alia,* (i) to examine and audit the books, records and accounts of firms engaged in the securities business in accordance with generally accepted auditing standards, (ii) to express opinions with respect to the financial statements of such firms as fairly reflecting their financial condition and results of

operations in accordance with generally accepted accounting principles, and (iii) to prepare and assist in the preparation of the reports concerning such books, records, accounts and opinions required by Section 17 of the 1934 Act (15 U.S.C. Section 78q) and the rules and regulations promulgated thereunder. Touche Ross further held itself out as being familiar with accounting and auditing practices and standards required by the SEC and the Exchange for firms engaged in the securities business.

17. From approximately 1969 until the Date of Adjudication, Touche Ross was engaged by Weis for valuable consideration to serve as Weis' independent certified public accounting firm. During this period Touche Ross agreed to conduct annual audits of the affairs of Weis and to issue opinions and prepare reports on its financial statements, all in accordance with Section 17 of the 1934 Act (15 U.S.C. Section 78q), generally accepted auditing standards, generally accepted accounting principles, and the audit regulations of the SEC and the Exchange. In accepting said engagement, Touche Ross agreed to perform said services in a thorough, proper, skillful and diligent manner.

18. Weis and its Board of Directors, customers, creditors, lenders and shareholders, and the SEC, the Exchange and SIPC relied on Touche Ross to apply the standards and expertise, to express the opinions, to make the certifications and to prepare or assist in the preparation of the reports discussed in paragraphs 16 and 17, *supra,* for the purposes, among others, of (i) protecting Weis from fraudulent activity of its officers, directors, agents, and employees; (ii) safeguarding the existence and use of Weis' assets; (iii) assuring the accuracy of financial data submitted directly or indirectly to the Exchange, the SEC and SIPC, and generally made available to the public; (iv)

determining whether Weis could continue to engage in business as a broker-dealer in securities; (v) determining whether or not significant restrictions and alterations in the scope and nature of its operations would be required in order for Weis to continue to engage in business as a broker-dealer; and (vi) making informed business decisions concerning the future operations of Weis on the basis of accurate financial information.

19. In or about late 1971 or early 1972, Touche Ross agreed with Weis to perform the aforementioned auditing and accounting services for the year 1972. Among other things, Touche Ross agreed (a) to prepare, cause to be prepared, and assist in the preparation of financial statements of Weis and to issue opinion letters with respect to said statements; (b) to audit the affairs of Weis in accordance with generally accepted auditing standards, generally accepted accounting principles, and the audit regulations promulgated by the Exchange and the SEC pursuant to Sections 6 and 17 of the 1934 Act (15 U.S.C. Sections 78f and 78q); (c) to notify the Exchange promptly that such audit had been commenced; (d) to prepare an answer to the financial questionnaire (the "Answers to the Financial Questionnaire") of the Exchange based upon said audit; (e) to submit to the Exchange (i) a copy of the Answers to the Financial Questionnaire, (ii) an attestation that the requirements of the audit regulations had been observed in the conduct of the audit, and (iii) a statement that Touche Ross had made a review of Weis' accounting system, internal accounting control, and procedures for safeguarding securities; (f) to furnish to the Exchange comments relative to any material inadequacies found to exist in Weis' accounting system, internal accounting control, and procedures for safeguarding securities; and (g) to indicate any corrective action taken or proposed.

20. Weis' employment of Touche Ross as its independent certified public accounting firm was not merely a matter of private contract between Weis and Touche and Ross, but was required by the Exchange pursuant to its duty under Section 6 of the 1934 Act (15 U.S.C. Section 78f) to regulate its members' conduct of their businesses and supervise their financial condition for the benefit of the public. Touche Ross knew or should have known that Weis' engagement of an independent certified public accounting firm was a requirement of the Exchange and that it was for the benefit both of Weis in making decisions with respect to the operation of its business and of persons other than Weis.

21. Touche Ross' examination of and report on Weis' financial condition were not intended solely for the benefit of Weis but were, pursuant to Section 17 of the 1934 Act (15 U.S.C. Section 78q) and the rules and regulations promulgated thereunder, intended for and submitted directly or indirectly to, *inter alia,* the SEC, the Exchange, SIPC, and Weis' customers, creditors, lenders and shareholders. The Exchange was the organization designated and relied upon by SIPC to examine Weis for compliance with the applicable financial responsibility rules and to alert SIPC of Weis' financial difficulty.

22. Touche Ross knew or should have known that its examination of and report on Weis' financial condition were a requirement of Section 17 of the 1934 Act (15 U.S.C. Section 78q) and the rules and regulations promulgated thereunder, and were for the benefit both of Weis and of persons other than Weis.

23. In accordance with its engagement agreement, Touche Ross purported to conduct an audit of Weis' books and records for the fiscal year ended May 26, 1972 and in connection therewith (a) certified, prepared, caused to be

prepared, and assisted in the preparation of financial statements of Weis; (b) certified and prepared Weis' Answers to the Financial Questionnaire; and (c) issued four opinion letters (the "1972 Opinion Letters") to the Board of Directors of Weis dated, respectively, July 7, 1972, July 7, 1972, July 21, 1972 and July 21, 1972.

24. By means of the foregoing, Touche Ross represented and certified that it had examined (i) the statement of Weis' financial condition as of May 26, 1972, (ii) Weis' Answers to the Financial Questionnaire as of May 26, 1972, (iii) Weis' consolidated balance sheet for the 52 weeks ended May 26, 1972, and (iv) Weis' consolidated statement of earnings for the five years ended May 26, 1972. The letter pertaining to the Answers to the Financial Questionnaire stated that the Touche Ross examination had been made "in accordance with generally accepted auditing standards, and accordingly included a review of the accounting system, internal accounting control and the procedures for safeguarding securities including such tests thereof . . . as [Touche Ross] considered necessary in the circumstances, including the audit procedures prescribed by the New York Stock Exchange and the Securities and Exchange Commission." The letter also stated that the Answers to the Financial Questionnaire presented fairly the financial position of Weis at May 26, 1972 in the form prescribed by the Exchange and the SEC in conformity with generally accepted accounting principles applied on a consistent basis. Each of the other three 1972 Opinion Letters stated that the Touche Ross examination had been conducted in accordance with generally accepted auditing standards and that the aforementioned financial statements presented fairly the financial position of Weis and subsidiaries at May 26, 1972, and the results of operations and changes in their financial position for the year and the five years then ended, in conformity with generally accepted

accounting principles applied on a consistent basis. (The 1972 Opinion Letters and accompanying Answers to the Financial Questionnaire and financial statements are annexed hereto as Exhibits A, B, C and D.)

25. Touche Ross knew, should have known and intended that Weis and its Board of Directors would rely on the 1972 Opinion Letters and accompanying Answers to the Financial Questionnaire and financial statements for various purposes, including those set forth in paragraph 18, *supra.*

26. Touche Ross knew, should have known and intended that the SEC, the Exchange and SIPC would rely on the 1972 Opinion Letters and accompanying Answers to the Financial Questionnaire and financial statements in carrying out their respective regulatory, supervisory and protective duties with respect to Weis, in determining whether Weis was in compliance with the applicable financial responsibility rules, and in determining whether Weis was in financial difficulty.

27. Touche Ross knew, should have known and intended that Weis' customers, creditors, lenders and shareholders would rely directly or indirectly on the 1972 Opinion Letters and accompanying Answers to the Financial Questionnaire and financial statements in making decisions whether to commence or continue their respective relationships with Weis.

28. Touche Ross breached and failed to perform its agreement and obligation to render auditing and accounting services with respect to Weis in a thorough, proper, skillful and diligent manner and performed said services in a negligent, reckless, careless, unskilled and grossly negligent manner in that, among other things, it:

a. failed to audit, verify and examine the books, rec-

ords, accounts and financial statements of Weis in accordance with generally accepted auditing standards, generally accepted accounting principles, and the audit regulations of the Exchange and the SEC;

b. failed to prepare, cause to be prepared, and assist in the preparation of accurate financial statements of Weis and Weis' Answers to the Financial Questionnaire;

c. rendered the 1972 Opinion Letters, which were false, inaccurate and incomplete;

d. failed properly to test, study and evaluate Weis' system of internal accounting control;

e. failed to obtain competent evidential matter sufficient to afford a proper basis for the 1972 Opinion Letters;

f. falsely certified that it had examined Weis' books and records in accordance with generally accepted auditing standards, generally accepted accounting principles, and the audit regulations of the Exchange and SEC; and

g. failed to inform or otherwise alert Weis, its Board of Directors, the SEC and the Exchange (and, through the Exchange, SIPC) (i) of the material errors in Weis' Answers to the Financial Questionnaire and in Weis' financial statements prepared in connection with the 1972 Touche Ross audit; (ii) of the existence of inaccurate and unreliable books and records with respect to Weis; or (iii) of the possibility that Weis was facing financial difficulty.

29. Specifically, among other things, Touche Ross failed properly to audit, verify and examine:

(a) the Scheinman Hochstin & Trotta liquidation omnibus account (the "SH&T Omnibus Account"), a claimed asset of $745,000. If Touche Ross had audited,

verified and examined the SH&T Omnibus Account in accordance with generally accepted auditing standards, generally accepted accounting principles, and the audit regulations of the Exchange and the SEC, it would have discovered the following:

(1) that in or about April 1972 the SH&T Omnibus Account had been debited in the amount of approximately $625,000;

(2) that, contrary to generally accepted accounting principles, the offsetting credits for this debit were to one or more income accounts;

(3) that the purpose and effect of these improper credits were to overstate Weis' gross income by approximately $625,000 and its net income and net worth by approximately $312,500; and

(4) that an overstatement by this amount was a material overstatement because it constituted over 30% of Weis' claimed net income for the entire fiscal year ended May 26, 1972 and over 4% of Weis' claimed net worth as of that date.

(b) the Winslow, Cohu & Stetson ("WC&S") insurance claim receivable, a claimed asset of $1,285,000. If Touche Ross had audited, verified and examined the WC&S insurance claim receivable in accordance with generally accepted auditing standards, generally accepted accounting principles, and the audit regulations of the Exchange and the SEC, it would have discovered the following:

(1) that, on or about May 8, 1972, the WC&S insurance claim receivable had improperly been increased in value (debited) from $600,000 to $785,000 because of interest purportedly payable on the claim;

(2) that, on or about May 25, 1972, the WC&S insurance claim receivable had improperly been

further increased in value (debited) to $1,285,000 because of a purported increase in the value of the claim;

(3) that, contrary to generally accepted accounting principles, the offsetting credits for these two debits had been made to various income accounts;

(4) that the purpose and effect of these improper transactions were to overstate Weis' gross income by approximately $685,000 and its net income and net worth by approximately $342,500;

(5) that an overstatement by this amount was a material overstatement because it constituted nearly 35% of Weis' claimed net income for the entire fiscal year ended May 26, 1972 and approximately 4.5% of Weis' claimed net worth as of that date.

(c) other false, fraudulent and improper entries, irregularities and accounting transactions in the books of Weis which included, *inter alia,* the following:

(1) The re-depositing into income accounts of at least $800,000 worth of checks which were purportedly drawn to pay vendors or other creditors, thus overstating Weis' net income and net worth by at least $400,000;

(2) The doubling (to approximately $432,000) of accrued commission income for May 22-26, 1972, thus overstating Weis' net income, net worth, and net capital by approximately $108,000;

(3) The improper crediting of income accounts with proceeds from a sale-leaseback transaction, thus overstating Weis' net income and net worth;

(4) The improper transfer of certain short security positions to dividend receivable accounts;

(5) The improper failure to record certain liabilities of Weis on the books of Weis;

(6) The manipulation of certain error acounts to reflect false credit balances of $100,000 to $200,000, which then were taken into income, thus overstating Weis' net income, net worth and net capital by approximately $50,000 to $100,000;

(7) The improper designation of up to $500,000 worth of miscellaneous receivables as "current" so that it was not necessary to deduct them from capital in computing Weis' net capital ratio under Exchange Rule 325, with the result that Weis' net capital ratio was made to appear to be below 10:1 and Weis thus was not precluded by Exchange Rule 326 from expanding its business.

30. Upon the discovery by Touche Ross of any one or more of the false entries or improper accounting transactions discussed in paragraph 29 above, Touche Ross would have had an obligation to report such discoveries, *inter alia,* to Weis, its Board of Directors, the SEC and the Exchange (and, through the Exchange, SIPC); and it would have had an obligation to report such discoveries in the 1972 Opinion Letters and to refrain from issuing the 1972 Opinion Letters in the form they actually took.

31. As a direct and proximate result of Touche Ross' failure to conduct the 1972 audit of Weis in accordance with generally accepted auditing standards, generally accepted accounting principles, and the audit regulations of the Exchange and the SEC:

a. the acts of the Weis Five as set forth in paragraphs 10 through 13 herein were not promptly discovered, and the Weis Five were able to continue to make false and fictitious entries in Weis' books, records and financial

statements in order to conceal Weis' true financial condition during its fiscal year 1973;

b. other misstatements and inaccuracies in Weis' books, records and financial statements were not discovered;

c. Weis, its Board of Directors, the Exchange, the SEC, SIPC, and Weis' customers, creditors, lenders and shareholders were misled by Touche Ross into believing or assuming that as of May 26, 1972 Weis was in sound financial condition and in compliance with applicable financial responsibility rules;

d. Weis, its Board of Directors, the Exchange, the SEC and SIPC were prevented from (i) knowing the true financial condition of Weis, (ii) performing their respective duties to safeguard the assets of Weis and the property Weis was holding in trust for its customers, (iii) taking and causing to be taken appropriate and immediate remedial action at a time when a forced liquidation of Weis under the 1970 Act could have been prevented, and (iv) taking or causing to be taken appropriate and immediate action to avoid or reduce the costs of satisfying the claims of Weis' customers;

e. the acts of the Weis Five as set forth in paragraphs 10 through 13 herein were not discovered by Weis, its Board of Directors, the SEC, SIPC or the Exchange until April and May 1973 at which time the only remedial action that could be taken was the forced liquidation of Weis under the 1970 Act, which caused and continues to cause substantial injury to Weis and SIPC as well as Weis' customers, creditors, lenders and shareholders;

f. the assets of Weis and the property Weis was holding in trust for its customers were not on the Filing Date or thereafter sufficient to satisfy the claims of Weis' customers, creditors, lenders and shareholders;

g. Weis was unable to comply with the minimum financial responsibility rules which would allow it to conduct its business as a broker-dealer in securities, was unable to restore itself to a condition in which it could remain in business, and lost the value of its business and assets as a going concern;

h. the assets of Weis were wasted and mismanaged; and

i. Weis was caused to undertake financial obligations which it could not satisfy and which it would not or could not have undertaken had its true financial condition as of May 26, 1972 been known to Weis and its Board of Directors, the SEC, the Exchange and SIPC.

AS AND FOR PLAINTIFF TRUSTEE'S FIRST CAUSE OF ACTION

32. Plaintiff Trustee repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

33. As a result of the errors and omissions of Touche Ross, including those set forth in paragraphs 28 through 30 herein, Touche Ross violated, and aided and abetted the Weis Five in violating, Section 17 of the 1934 Act (15 U.S.C. Section 78q) and the rules and regulations promulgated thereunder, which require broker-dealers such as Weis to file with regulatory authorities accurate and truthful reports of their financial condition, including reports such as those certified by Touche Ross, in order to ensure the integrity and safety of the nation's securities markets and of the brokers and dealers that participate therein.

34. Weis, its Board of Directors, its creditors, customers, lenders and shareholders were among the class of persons which Section 17 of the 1934 Act was designed to

protect and were among the beneficiaries of duties imposed on Touche Ross by Section 17 of the 1934 Act. The injuries which have occurred to Weis, its creditors, customers, lenders and shareholders as a result of the liquidation of Weis were of the type that Section 17 of the 1934 Act was intended to prevent.

35. As a result of Touche Ross' violation of Section 17 of the 1934 Act and the rules and regulations promulgated thereunder, its aiding and abetting of the Weis Five's violation of Section 17 of the 1934 Act and the rules and regulations promulgated thereunder, and its breach of the duties imposed by Section 17 of the 1934 Act and the rules and regulations promulgated thereunder, Weis, its creditors, customers, lenders and shareholders have suffered and will continue to suffer damages in an amount which is presently estimated to be at least $51,000,000.

AS AND FOR PLAINTIFF TRUSTEE'S
SECOND CAUSE OF ACTION

36. Plaintiff Trustee repeats and realleges each and every allegation contained in paragraphs 1 through 34 herein as though here set forth in full.

37. As a result of Touche Ross' negligence per se in violating Section 17 of the 1934 Act (15 U.S.C. Section 78q), and not as the result of any negligence of the Trustee or Weis, Weis has suffered and will continue to suffer damages in an amount which is presently estimated to be at least $51,000,000.

AS AND FOR PLAINTIFF TRUSTEE'S
THIRD CAUSE OF ACTION

38. Plaintiff Trustee repeats and realleges each and

every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

39. As a result of the negligence and malpractice of Touche Ross, including that set forth in paragraphs 28 through 30 herein, and not as the result of any negligence of the Trustee or Weis, Weis has suffered and will continue to suffer damages in an amount which is presently estimated to be at least $51,000,000.

AS AND FOR PLAINTIFF TRUSTEE'S
FOURTH CAUSE OF ACTION

40. Plaintiff Trustee repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

41. The auditing and accounting services performed by Touche Ross with respect to Weis were performed in so reckless and grossly negligent a manner that Touche Ross knew or should have known that the 1972 Opinion Letters and the accompanying Answers to the Financial Questionnaire and financial statements were false, inaccurate and incomplete.

42. By reason of the foregoing reckless and grossly negligent conduct of Touche Ross, and not as the result of any negligence of the Trustee or Weis, Weis has suffered and will continue to suffer damages in an amount which is presently estimated to be at least $51,000,000.

AS AND FOR PLAINTIFF TRUSTEE'S
FIFTH CAUSE OF ACTION

43. Plaintiff Trustee repeats and realleges each and

every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

44. In connection with the auditing and accounting services performed by Touche Ross and as compensation therefor, Weis paid Touche Ross a certain sum of money (the "Touche Ross Fee"), the amount of which is not presently known to Plaintiff Trustee.

45. By reason of Touche Ross' breach of and failure to perform its agreement to render said auditing and accounting services in a thorough, proper, skillful and diligent manner, Weis is entitled to general damages in the amount of the Touche Ross Fee and to consequential damages in an amount which is presently estimated to be at least $51,000,000.

AS AND FOR PLAINTIFF TRUSTEE'S
SIXTH CAUSE OF ACTION

46. Plaintiff Trustee repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

47. In its engagement letter with Weis and other communications to Weis, Touche Ross expressly and impliedly warranted to Weis that its services to Weis would be of a certain quality (i.e. that, *inter alia,* they would comply with generally accepted auditing standards, generally accepted accounting principles, and the audit regulations of the Exchange and the SEC).

48. By reason of the breaches and failures of Touche Ross, including those set forth in paragraphs 28 through 30 herein, those services were not of the warranted quality and were wholly without value to Weis.

49. By reason of Touche Ross' breach of warranty of the quality of its services to Weis, Weis is entitled to general damages in the amount of the difference between the actual and warranted values of the services rendered, and to consequential damages in an amount which is presently estimated to be at least $51,000,000.

AS AND FOR PLAINTIFF SIPC'S
FIRST CAUSE OF ACTION

50. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

51. Touche Ross' audit of Weis failed to comply with the auditing standards and regulations prescribed by the 1934 Act and the rules and regulations promulgated thereunder, in that the 1972 Opinion Letters and the accompanying Answers to the Financial Questionnaire and financial statements prepared by Touche Ross were false, inaccurate and incomplete.

52. As a consequence of the liquidation of Weis, the SIPC fund has been or may be depleted in order to satisfy the claims of over 34,000 customers and certain other creditors of Weis and to pay for certain administrative expenses of the liquidation.

53. As a result of Touche Ross' failure to comply with the auditing standards prescribed by the 1934 Act and the rules and regulations promulgated thereunder, and as a result of Touche Ross' breach of the duties it owed to SIPC thereunder, SIPC has suffered and will continue to suffer damages in an amount which is presently estimated to be at least $14,000,000.

AS AND FOR PLAINTIFF SIPC'S
SECOND CAUSE OF ACTION

54. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

55. As a result of Touche Ross' failure to comply with the auditing standards prescribed by the 1934 Act and the rules and regulations promulgated thereunder, in that the 1972 Opinion Letters and accompanying Answers to the Financial Questionnaire and financial statements prepared by Touche Ross were false, inaccurate and incomplete, Touche Ross breached the duties it owed to the customers and certain other creditors of Weis by misleading them into believing or assuming that Weis was not in financial difficulty, and consequently over 34,000 of said customers and creditors ultimately filed claims in the Weis liquidation proceeding.

56. The SIPC fund has been or may be depleted in order to satisfy the claims of the over 34,000 customers and certain other creditors of Weis, hereinabove mentioned in paragraph 55, and to pay for certain administrative expenses of the liquidation.

57. But for Touche Ross' breach of the duties it owed to the customers and certain other creditors of Weis by its failure to comply with the auditing standards and regulations prescribed by the 1934 Act and the rules and regulations promulgated thereunder, the SIPC fund would not have been depleted to the extent that it has been, if at all, and consequently SIPC is subrogated to those claims which such customers and certain other creditors of Weis who have been paid out of the SIPC fund could have as-

serted against Touche Ross based on the auditing and accounting services performed by Touche Ross with respect to Weis.

58. The aggregate of the claims of Weis' customers and certain other creditors which have been satisfied out of the SIPC fund and for which Touche Ross is liable to SIPC is presently estimated to be at least $14,000,000.

AS AND FOR PLAINTIFF SIPC'S
THIRD CAUSE OF ACTION

59. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

60. Touche Ross had knowledge of or, but for its errors and omissions, should have had knowledge of the deception caused by the Weis Five, in violation of the 1934 Act and the rules and regulations promulgated thereunder, by means of the filing or dissemination of the 1972 Opinion Letters and accompanying Answers to the Financial Questionnaire and financial statements.

61. Touche Ross breached the duties it owed to SIPC by failing to inquire as to, and to disclose, the deception caused by the Weis Five, in violation of the 1934 Act and the rules and regulations promulgated thereunder, by means of the filing or dissemination of the 1972 Opinion Letters and the accompanying Answers to the Financial Questionnaire and financial statements.

62. The SIPC fund has been or may be depleted in order to satisfy the claims of over 34,000 customers and certain other creditors of Weis and to pay for certain administrative expenses of the liquidation.

63. As a result of Touche Ross' aiding and abetting of the Weis Five's violation of the 1934 Act and the rules and regulations promulgated thereunder as discussed in paragraphs 60 and 61 hereinabove, and as a result of the consequent depletion of the SIPC fund as indicated in paragraph 62 hereinabove, SIPC has suffered and will continue to suffer damages in an amount which is presently estimated to be at least $14,000,000.

AS AND FOR PLAINTIFF SIPC'S
FOURTH CAUSE OF ACTION

64. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

65. Touche Ross had knowledge of or, but for its errors and omissions, should have had knowledge of the deception caused by the Weis Five, in violation of the 1934 Act and the rules and regulations promulgated thereunder, by means of the filing or dissemination of the 1972 Opinion Letters and the accompanying Answers to the Financial Questionnaire and financial statements.

66. Touch Ross breached the duties it owed to the customers and certain other creditors of Weis by failing to inquire as to, and to disclose, the deception caused by the Weis Five, in violation of the 1934 Act and the rules and regulations promulgated thereunder, by means of the filing or dissemination of the 1972 Opinion Letters and accompanying Answers to the Financial Questionnaire and financial statements.

67. The SIPC fund has been or may be depleted in order to satisfy the claims of over 34,000 customers and certain

other creditors of Weis and to pay for certain administrative expenses of the liquidation.

68. But for Touche Ross' aiding and abetting of the Weis Five's violation of the 1934 Act and the rules and regulations promulgated thereunder, as discussed in paragraphs 65 and 66 hereinabove, the SIPC fund would not have been depleted to the extent that it has been, if at all, and consequently SIPC is subrogated to those claims which such customers and certain other creditors of Weis who have been paid out of the SIPC fund could have asserted against Touche Ross based on the auditing and accounting services performed by Touche Ross with respect to Weis.

69. The aggregate of the claims of Weis' customers and certain other creditors which have been satisfied out of the SIPC fund and for which Touche Ross is liable to SIPC is presently estimated to be at least $14,000,000.

AS AND FOR PLAINTIFF SIPC'S
FIFTH CAUSE OF ACTION

70. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

71. As a consequence of the liquidation of Weis, SIPC was required to satisfy the claims of over 34,000 customers and certain other creditors of Weis and to pay for certain administrative expenses of the liquidation.

72. As a result of the negligence and malpractice of Touche Ross, including that set forth in paragraphs 28 through 30 herein, and not as a result of any negligence of SIPC, SIPC has suffered and will continue to suffer damages in an amount which is presently estimated to be at least $14,000,000.

AS AND FOR PLAINTIFF SIPC'S
SIXTH CAUSE OF ACTION

73. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

74. As a result of the negligence and malpractice of Touche Ross, including that set forth in paragraphs 28 through 30 herein (and not as a result of any negligence of any customer or creditor of Weis), the customers and certain other creditors of Weis were misled into believing or assuming that Weis was not in financial difficulty, and consequently over 34,000 of said customers and creditors ultimately filed claims in the Weis liquidation proceeding.

75. The SIPC fund has been or may be depleted in order to satisfy the claims of the over 34,000 customers and certain other creditors of Weis, hereinabove mentioned in paragraph 74, and to pay for certain administrative expenses of the liquidation.

76. But for Touche Ross' negligence and malpractice, the SIPC fund would not have been depleted to the extent that it has been, if at all, and consequently SIPC is subrogated to those claims which such customers and certain other creditors of Weis who have been paid out of the SIPC fund could have asserted against Touche Ross based on the auditing and accounting services performed by Touche Ross with respect to Weis.

77. The aggregate of the claims of Weis' customers and certain other creditors which have been satisfied out of the SIPC fund and for which Touche Ross is liable to SIPC is presently estimated to be at least $14,000,000.

AS AND FOR PLAINTIFF SIPC'S
SEVENTH CAUSE OF ACTION

78. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

79. As a consequence of the liquidation of Weis, the SIPC fund has been or may be depleted in order to satisfy the claims of over 34,000 customers and certain other creditors of Weis and to pay for certain administrative expenses of the liquidation.

80. As a result of the malpractice of Touche Ross and its breach of the duties it owed to SIPC (and not as a result of any negligence of SIPC), in that the auditing and accounting services performed by Touche Ross were conducted in so reckless and grossly negligent a manner that Touche Ross knew or should have known that the 1972 Opinion Letters and the accompanying Answers to the Financial Questionnaire and financial statements were false, inaccurate and incomplete, SIPC has suffered and will continue to suffer damages in an amount which is presently estimated to be at least $14,000,000.

AS AND FOR PLAINTIFF SIPC'S
EIGHTH CAUSE OF ACTION

81. Plaintiff SIPC repeats and realleges each and every allegation contained in paragraphs 1 through 31 herein as though here set forth in full.

82. As a result of the malpractice of Touche Ross and its breach of the duties it owed to the customers and certain other creditors of Weis (and not as a result of any

negligence of any customer or creditor of Weis), in that the auditing and accounting services performed by Touche Ross were conducted in so reckless and grossly negligent a manner that Touche Ross knew or should have known that the 1972 Opinion Letters and the accompanying Answers to the Financial Questionnaire and financial statements were false, inaccurate and incomplete, the customers and certain other creditors of Weis were misled into believing or assuming that Weis was not in financial difficulty, and consequently over 34,000 of said customers and certain other creditors ultimately filed claims in the Weis liquidation proceeding.

83. The SIPC fund has been or may be depleted in order to satisfy the claims of the over 34,000 customers and certain other creditors of Weis, hereinabove mentioned in paragraph 82, and to pay for certain administrative expenses of the liquidation.

84. But for Touche Ross' malpractice, recklessness and gross negligence, the SIPC fund would not have been depleted to the extent that it has been, if at all, and consequently SIPC is subrogated to those claims which such customers and certain other creditors of Weis who have been paid out of the SIPC fund could have asserted against Touche Ross based on the auditing and accounting services performed by Touche Ross with respect to Weis.

85. The aggregate of the claims of Weis' customers and certain other creditors which have been satisfied out of the SIPC fund and for which Touche Ross is liable to SIPC is presently estimated to be at least $14,000,000.

WHEREFORE, plaintiffs demand judgment:

a. for $51,000,000 on Plaintiff Trustee's First Cause of Action;

b. for $51,000,000 on Plaintiff Trustee's Second Cause of Action;

c. for $51,000,000 on Plaintiff Trustee's Third Cause of Action;

d. for $51,000,000 on Plaintiff Trustee's Fourth Cause of Action;

e. for the amount of the Touche Ross Fee plus $51,000,000 on Plaintiff Trustee's Fifth Cause of Action;

f. for an amount which is the difference between the actual and warranted values of Touche Ross' services with respect to Weis, plus $51,000,000, on Plaintiff Trustee's Sixth Cause of Action;

g. for $14,000,000 on Plaintiff SIPC's First Cause of Action;

h. for $14,000,000 on Plaintiff SIPC's Second Cause of Action;

i. for $14,000,000 on Plaintiff SIPC's Third Cause of Action;

j. for $14,000,000 on Plaintiff SIPC's Fourth Cause of Action;

k. for $14,000,000 on Plaintiff SIPC's Fifth Cause of Action;

l. for $14,000,000 on Plaintiff SIPC's Sixth Cause of Action;

m. for $14,000,000 on Plaintiff SIPC's Seventh Cause of Action;

n. for $14,000,000 on Plaintiff SIPC's Eighth Cause of Action;

o. for interest on the amounts demanded herein;

p. for the costs and disbursements of this action; and

q. for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York
April 30, 1976

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